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OCTOBER TERM, 1958

No. 17

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC., *Petitioners,*

v.

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR PETITIONERS

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Section 5 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions below are reported at 248 F. 2d 438 and are reproduced at R. 689-709.[1] The decision of the trial court, affirmed by the majority below, is reported at 141 F. Supp. 658-673 and is reproduced at R. 555-581.

[1] The case was argued before a Court composed of Chief Judge Clark and Judges Frank and Hincks on November 15, 1956. Judge Frank died before the Court's opinion could be announced and was replaced by Judge Waterman. Without further argument,

JURISDICTION

The Judgment of the Court of Appeals, entered September 9, 1957, is reproduced at R. 710. Jurisdiction is invoked here under 28 U.S.C. 1254(a)(1). Jurisdiction below was based upon Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15. An order allowing certiorari was entered on January 20, 1958 (R. 711).

STATUTE INVOLVED

The statute involved is Section 5 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 16, which reads in material part:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ."

QUESTIONS PRESENTED

1. Whether the lower Courts misconstrued Section 5, and misapplied this Court's decision in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951) by failing to make available to petitioners "all matters

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the Court on September 9, 1957, issued an opinion by Judge Waterman, concurred in by Judge Hincks, affirming the judgment. See 248 F. 2d at 440. Chief Judge Clark wrote a dissenting opinion and Judge Frank had also voted to reverse before his death. See 248 F. 2d at 451. The opinion which prevailed ultimately below was, therefore, contrary to the opinion of the Court that heard the argument.

previously established by the Government in antitrust actions", *id* at 568.

2. Whether the lower Courts' failure to find illegal injury in this case was due to their failure to recognize the *Paramount* judgment as proof of the alleged conspiracy.

STATEMENT OF THE CASE

The Facts

1. This is an action for damages under the antitrust laws, which was tried to the Court without a jury (R. 555). Petitioners together form a single motion picture producing and distributing business, referred to hereafter as Eagle Lion. The business of distributing motion pictures involves (1) obtaining pictures for distribution, either by producing them or making distribution contracts with producers under which a percentage of the income produced by a given film is retained as a distribution fee, and (2) distributing the pictures to motion picture theatres by license contracts under which the theatre rents a positive print of the film for exhibition in a particular theatre during a particular time period. The rental paid by the theatre is either a percentage of the admission revenue received by the theatre during the exhibition of the film, a fixed sum or a guarantee against such a percentage. The gross rental received for a given picture is therefore a function of *the amount of playing time in theatres* that the distributor can secure for its exhibition. All of the distributors involved in this action distributed films to theatres in all parts of the United States, through branch offices in the principal cities.

During the period 1946-50 Eagle Lion was attempting to compete for playing time in motion picture

theatres with the eight film distributors who were the principal defendants in *United States* v. *Paramount Pictures, Inc.*[2] (R. 690-93). The respondents' neighborhood first-run theatres in New York City were then affiliated with two of these major distributors, Loew's and RKO (R. 551). Eagle Lion sued the owners of these theatres for damages because it claimed that playing time in these theatres, admittedly crucial to the financial success of a motion picture in the New York market (R. 691), was not available to independent[3] distributors on the basis of box-office merit (R. 692).

2. Eagle Lion supplied testimony on behalf of the United States during the trial of the *Paramount* case and, as Judge Clark noted in his dissenting opinion (R. 708), was:

> "one of the three nationwide independent film distributors found in the *Paramount* case to be adversely affected by the defendants' conspiracy."[4]

3. The trial issue here was whether respondents, contrary to the Sherman Act, combined and conspired

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[2] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); decided on remand 85 F. Supp. 881 (S.D.N.Y. 1949), *aff'd sub nom Loew's Inc.* v. *United States*, 339 U.S. 974 (1950). The decree, findings of fact and conclusions of law on remand, entered February 8, 1950, were not officially reported, but are reproduced in full text at R. 585-644.

[3] The term independent, as used herein, has the same meaning as that given the term in the *Paramount* Case, to wit, "a producer, distributor or exhibitor, as the context requires, which is not a defendant in" that case "or a subsidiary or affiliate" of such defendant (R. 595).
695-696).

[4] See findings 99 and 100, R. 616-17 and R. 659. In printing "PRC" was mistakenly transposed to "RKO" at the bottom of page 616.

to deny Eagle Lion the opportunity to distribute films for first neighborhood run in metropolitan New York "on a competitive basis" during the years 1946-1950 (R. 692). During that period respondents owned the two "dominant" first neighborhood run theatre circuits comprising approximately 100 theatres (R. 690, 560).

4. Eagle Lion contended that in allocating to distributors the limited playing time available in their circuits, the respondents concertedly favored their distributor co-defendants in the *Paramount* case, and discriminated against independent distributors, including Eagle Lion. Respondents' terms for a showing in their first neighborhood circuits determined a distributor's financial success or failure in marketing any film in metropolitan New York.[5] Those terms not only applied to the neighborhood first run as such, but also controlled the film's playing position and potential earnings on all succeeding runs in the New York City area (R. 691). In combination, these runs alone yielded the eight distributor defendants in the *Paramount* case 8.9 percent of the total distribution income they obtained from all other sources in the United

[5] Both circuits followed the practice of dividing the play week into a "long-half" of five or six days and a short half of one or two days with double features on each half (R. 561-2). But only the feature granted "top billing" on the long half was allowed a rental figured as a percentage of box-office receipts, the other playing positions receiving "less favorable" flat rentals (R. 562). While the 100 theatres comprising the top circuits thus consumed only 104 pictures per year on the more favorable percentage terms, in each of the years 1946-50, the eight *Paramount* defendants distributed a total of about 250 features per year (R. 565). In the same four years, Eagle Lion distributed a total of 195 features, only eight of which were accorded the preferred percentage playing position (R. 562).

States. (R. 700). The corresponding percentage for Eagle Lion was only 6.4 (*Ibid*). Eagle Lion claimed that a dollar difference of $417,000 resulting from this 2.5 percent differential measured the extent of its injury from respondents' conspiracy (R. 699).

5. To establish the alleged conspiracy, Eagle Lion relied on the judgment in the *Paramount* case, particularly as illuminated in the ultimate findings of fact and conclusions of law entered February 8, 1950 (R. 585-644). While the *Paramount* findings pertain to the year 1945, Eagle Lion, as Judge Clark noted in his dissenting opinion (R. 707), made an independent showing "by quite adequate evidence that the same conditions continued in the period 1946 through 1950."[6] The *Paramount* court concluded that a nationwide conspiracy, in which these respondents participated, had "unreasonably restrained trade and commerce in the distribution and exhibition of motion pictures and attempted to monopolize such trade and commerce" (R. 641, 642, 643). The court adjudged that divorcement of the defendants' distribution and production businesses from their exhibition businesses was necessary to restore competitive conditions in the industry because otherwise the major distributors would remain

[6] For example, Eagle Lion showed that during the period more than 90 per cent of the total feature film rentals paid by the respondents' New York circuits went to the eight distributors who were defendants in the *Paramount* case (R. 648).

Neither the trial court nor the appellate court disputed the applicability of the *Paramount* findings and conclusions to the 1946-1950 period involved here. In 1950, the trial court there, on the basis of proof taken after remand of the case from this Court, found as a fact that "the change in status and practices since 1945 revealed by this evidence has been insufficient to warrant a change in the findings and judgment entered herein" (R. 639; Finding 158).

"dependent on one another to obtain theatre outlets for their own pictures" and there could not be "adequate competition among the defendants" or between them and independents "where such interdependence exists" (85 F. Supp. 881, 893).

6. The underlying determinations in *Paramount* described the local operation of the condemned conspiracy in the New York neighborhood market, as well as its overall execution in the nation as a whole. The findings of fact concerning the New York neighborhood market were as follows (F. 154(d), R. 636-637):[7]

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner and half of Universal."

The related conclusions of law stated (C. 16, R. 643):

> "Loew's Incorporated, has violated the Sherman Act by conspiring with RKO to monopolize and monopolizing the first neighborhood run in

[7] The symbols "F" and "C" are hereafter used to designate respectively particular findings of fact and conclusions of law in the *Paramount* case.

New York City, and by dividing of that market between itself and RKO."

7. Other findings made it clear that this New York pattern of distribution, whereby respondents arbitrarily divided the films of all eight distributor parties to the nationwide conspiracy, was part of a nationwide reciprocal pattern.[8] In other cities, where other major distributors owned the crucial first-run theatres, playing time in their theatres was made available to respondents' distributor affiliates upon similarly arbitrary terms.[9] The independent distributors were every-

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[8] "The major defendants aided each other in attaining a monopoly of exhibition and in restricting competition by refraining from having theatre interests in many areas where one of them had theatres" (F. 152; R. 632).

"The effect of the geographical distribution in towns having a population of less than 100,000 was largely to eliminate competition among all of the defendants in the areas where any of them had theatres" (F. 153(g); R.634). "The effect of the geographical distribution in cities having a population of more than 100,000 was substantially to limit competition among the major defendants" (F. 154(h); R. 638).

"In the relatively few areas where more than one of the major defendants had theatres, competition for first run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films" (F. 156; R. 638-639). "In 31 percent of the cities, containing 44 per cent of their theatre interests, there was competition among the defendants. But the New York neighborhood theatres of Loew and RKO, which are included in reaching the 44% figure, should properly be excluded because there is no competition between Loew and RKO in obtaining pictures for the reasons we have already given" (F. 154(g), R. 638).

[9] "[The] geographical distribution of theatres among the major defendants became part of a system in which competition was largely absent and the status of which was intentionally maintained by fixed runs, clearances and prices, by pooling agreements and joint ownerships among the major defendants, and by cross-

where subject to a fixed system of distribution and exhibition which made impossible competition with major distributors for playing time in their affiliated theatres.[10]

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licensing which made it necessary that they should work together" (F. 155; R. 638). "[The] privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a 'split'" (F. 156(a); R. 639).

"[The] vertical integration of each of the five major defendants . . . furnished an incentive for [and] a means of carrying out the restraints and conspiracies" (F. 147(a) and (b); R. 629). "The interdependency of defendants to obtain pictures for their theatres on the one hand, and on the other to obtain theatre outlets for their pictures has lessened competition among defendants and between them and independents" (F. 147(c); R. 629).

"There is substantial proof that monopoly power existed among the eight distributor-defendants who were all working together [and] must be viewed collectively rather than independently as to the power which they exercised over the market by major defendants' theatre holdings" (F. 147(d); R. 629). "Viewed collectively the major defendants owned in 1945 at least 70 percent of the first run theatres in the 92 largest cities" (F. 147(e); R. 629) and "60 percent of the rst run theatres in cities with populations between 25,000 and 100,000" (F. 148(a); R. 630). "As distributors the five major defendants received approximately 73 percent and the three minor defendants 21 percent of the domestic film rentals from the films, except Westerns, distributed in the 1943-44 season" (F. 148(d); R. 631).

[10] "[The conspirators] acted in concert in their grant of run and clearance" (F. 82; R. 612). "Both independent distributors and exhibitors, when attempting to bargain with the defendants, have been met by a fixed scale of clearance, runs and admission prices, to which they have been obliged to conform if they wished to get their pictures shown upon satisfactory runs" (F. 84; R. 612).

"The percentages of first run theatre ownership and domestic film rentals controlled by the major defendants when coupled with the strategic advantages of vertical integration created a power to exclude competition from the distribution and exhibition

The Prevailing Opinion

Judge Waterman's opinion upheld the trial court's ruling that the *Paramount* case was "certainly not evidence" that Eagle Lion had been denied competitive access to respondents' New York theatres (R. 695). Section 5, it said, did not permit the Court to "consider inferences, whether reasonable ones or not", from the prior judgment, due to "the relatively narrow limits of the doctrine of estoppel" (R. 696), as delineated by the following statement in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569 (1951):

> "Such estoppel extends only to questions 'distinctly put in issue and directly determined in the criminal prosecution."

Instead of analyzing the entire *Paramount* record to determine what "matters" had been decided, the

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markets when desired" (F. 148(e); R. 631). "This power might be exercised either against non-affiliated exhibitors or distributors, for the ownership of what was generally the best first run theatres, coupled with the possession by the defendants of the best pictures, enabled them substantially to control the market in first-run pictures" (F. 148(f); R. 631). "There is substantial proof that the intent to exercise the monopoly power existed among the defendants" (F. 148(g); R. 631).

"Effective relief from the monopoly power of and its exercise by the major defendants cannot be obtained without divorcement. No adequate competition among the defendants or between defendants and independents can exist in the presence of interdependency among the defendants on the one hand to obtain pictures for their own theatres and on the other to obtain theatre outlets for their own pictures. Divorcement is necessary to prevent the major defendants from being in a state of interdependence which too greatly restricts competition. Divorcement is a necessary remedy to introduce competition into defendants' system of fixed admission prices, clearances and runs, and to remove a major incentive to discriminatory trade practices" (F. 156(b); R. 639).

majority below discussed only a single finding (154(d) and a single conclusion of law (C. 16) concerning the New York market (R. 694-698). These were held irrelevant on the hypothesis that they dealt solely with the suppression of competition for the pictures of the eight conspirators and operated only "to the detriment of other theatre *exhibitors* in that area", as distinguished from "these plaintiffs, who were independent distribtuors" (R. 698). The remaining *Paramount* determinations, which showed that restriction of competition in the New York market was part of a national pattern whereby the defendants gave preference to each other's pictures, were peremptorily dismissed, without explanation, as "even less" relevant (R. 695, n. 5). Additionally, it was said that *Paramount* contained no finding "to the effect that defendants had agreed with each other to impose upon themselves the affirmative duty to give preference to the motion pictures of those major distributors that were assigned to them" (R. 698).[11]

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[11] The majority below considered petitioners' evidence of proportionately lower receipts from the New York neighborhood market, compared with the *Paramount* defendants, only in relation to the question whether a conspiracy was thereby established, independently of the *Paramount* case (R. 698). It concluded that these "film rental statistics, in and of themselves are not reliable proof of the existence of the alleged conspiracy" (R. 703).

The Court below expressly declined to consider the damage question, *i.e.*, the sufficiency of petitioners' proof of loss under the "wrong-doer" theory outlined by this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265 (1946):

> "Since the conspiracy was not proven, we do not examine the questions plaintiffs raise relating to the elements of alleged damages they claim to have suffered, and with respect to which much of their expert testimony was directed" (R. 705).

The Dissenting Opinion

Chief Judge Clark disputed Judge Waterman's interpolation of the words "of the major defendants" at the end of the unqualified finding that respondent had suppressed "competition between them in obtaining pictures" in the New York market (R. 706). He challenged this limitation as inconsistent with the various other *Paramount* findings and conclusions "which expressly include independent exhibitors and distributors", and which were "obviously . . . within the direct issues in the case" (R. 707). After summarizing the comprehensive nature of the national conspiracy, as found in *Paramount*, he further stated (R. 707):

> "To hold that this gigantic and complete monopoly does not reach the independent distributors, but leaves them free to compete with the big companies does not make sense. And, as we have seen, it is disproved by the findings and conclusions actually stated and the relief finally granted."

More generally, Judge Clark then voiced the conviction that the disposition of the case reflected a developing attitude of "hostility" by the trial courts toward antitrust cases (R. 709):

> "There seems to be a developing trend in some of our trial courts of hostility toward the 'big' antitrust case and of discovering obstacles—going even back to matters of pleading and pre-trial—in the way of a free showing of the need of remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, overworked court. But we are dealing with settled and cherished Congressional policy

which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy."

SUMMARY OF ARGUMENT

The Courts below denied to Eagle Lion the matters previously established by the *Paramount* judgment when they failed to recognize Eagle Lion as a target of the injurious conduct condemned in the *Paramount* case. As a result of this error, they ignored or misinterpreted independent evidence in this case showing the extent of Eagle Lion's injury from that conduct.

1. The final judgment in the *Paramount* case was persuasive evidence that the conspiracy there found was directed against Eagle Lion, since Eagle Lion was an independent distributor of films. The conspirators were eight film distributors and exhibitors affiliated with five of them, which included the respondents Loew's and RKO. The Court which heard the *Paramount* case concluded that the purpose of the conspiracy was to aid the conspirators at the expense of their independent competitors, whether distributors or exhibitors.

2. In the *Paramount* case the Court also found that Loew's and RKO had a monopoly of the neighborhood theatres in New York City and that there was no competition between them for pictures. Under the terms of the conspiracy the product of the eight distributor parties was arbitrarily allocated between Loew's and RKO. The result of this arbitrary allocation was that the only playing time available to independent distributors was that not preempted by the allocated films. The monopolistic efficiency of this arrangement was proven in this case by showing that the playing

time left for independent use yielded less than 10% of the total feature film rentals paid by these theatres for all feature films.

3. Eagle Lion, had also produced evidence at the *Paramount* trial which was incorporated in the *Paramount* findings to show the impact of the defendants' conspiracy upon independent distributors. Those findings showed that independent distributors' films averaged much less revenue per film, than those distributed by the conspiring distributors. This was a clear recognition that the conspiratorial exclusion of independent pictures from the defendants' theatres had had the effect of concentrating the most profitable films in the hands of the conspiring distributors.

4. There was independent proof in this case that the respondents' participation in the nation-wide conspiracy and their monopolization of the New York market had made it difficult for Eagle Lion to obtain an adequate supply of profitable pictures to distribute. There was further independent proof that in the monopolized New York market Eagle Lion had not earned as much, in proportion to its nation-wide earnings, as the conspiring distributors had. Accordingly, Eagle Lion liquidated its distribution business by a sale to one of the conspirator distributors, United Artists. All of this evidence was ignored or misinterpreted by the Courts below. Those Courts seized upon the fact that Eagle Lion's nation-wide rentals averaged less per film than the nation-wide rentals of the conspiring distributors as an excuse for discriminatory treatment of films of equal quality. The Courts below failed to recognize the fact that the conspirators distributed more of the expensive pictures than Eagle Lion did as a necessary consequence of the conspiracy. Instead,

the Courts below thought this fact made the performance of Eagle Lion and the conspiring distributors incomparable, and therefore prevented proof of Eagle Lion's injury in the New York market.

5. The errors below were all a direct result of the lower Court's failure to construe the findings in the *Paramount* case in the manner directed by *Emich*. Instead of drawing a reasoned conclusion as to the purpose of the *Paramount* conspiracy from the entire record in the *Paramount* case, the Courts below emasculated the *Paramount* findings which might benefit Eagle Lion. This was done by drawing patently unwarranted inferences, while giving lip service to the false doctrine that in construing the prior judgment, no inferences should be drawn, "whether reasonable ones or not."

Liability was clearly established and competent evidence from which a reasonable estimate of plaintiffs' damages may be made is in the record. The case should therefore be reversed and remanded to the District Court for a determination of the amount of those damages.

ARGUMENT

I. THE COURTS BELOW MISCONSTRUED SECTION 5 IN HOLDING THAT THE PARAMOUNT JUDGMENT WAS NOT EVIDENCE OF THE ALLEGED CONSPIRACY TO INJURE EAGLE LION

1. The lower Court's rationale

The majority below denied Eagle Lion any evidentiary benefit from the *Paramount* decree. In its own words, it held that "we must look elsewhere if we are to find *any* evidence of the conspiracy that the plaintiffs here charge" (R. 698).[12] It predicated this result

[12] Emphasis supplied throughout unless otherwise indicated.

on the basic concept, for which it cited no authority, that Section 5 of the Clayton Act prohibited consideration of "inferences, *whether reasonable ones or not*" (R. 696) in determining the sense of an adjudication against the same defendants in a prior government antitrust suit. To this newly conceived principle, the Court then added the *Emich* ruling that the estoppel effected by a *criminal* antitrust judgment "extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution" (R. 696).[13]

On these premises, the lower court dismissed as irrelevant the above-quoted *Paramount* determinations concerning the conspiracy of these very respondents in the precise local market here in issue, whereby they suppressed "competition between them in obtaining pictures" and monopolized the "first neighborhood run in New York City." It reasoned first that the *Paramount* court had found only that respondents "had agreed not to compete with each other for the films of the eight major distributors", with the "apparent effect" of monopolizing the first neighborhood market "to the detriment of the other theatre exhibitors" (R. 697-8). This, it said, did not involve "the different issue" whether respondents "conspired together" to suppress the competitive access of independent distributors to that market. (R. 698) It concluded its discussion of the *Paramount* case as follows (ibid):

> "Nor was there any finding in the *Paramount* case to the effect that the defendants had agreed with each other to impose upon themselves an affirmative duty to give preference to the motion pictures of those major distributors that were

[13] *Emich Motors Corp. v. General Motors Corp. supra*, at 568-9.

> assigned to them, thereby foreclosing the plaintiffs from access to all but the marginal exhibition needs of the defendants. In short, we must look elsewhere if we are to find any evidence of the conspiracy that the plaintiffs here charge."

The majority below did not discuss any of the *Paramount* findings dealing with the nation-wide operation of the conspiracy, summarily dismissing all of them as "even less" relevant (R. 695, n. 5).

In short, the Court ostensibly perceived an express *Paramount* finding of competitive injury to independent exhibitors in the New York first neighborhood market, while declining to draw any inference of injury to independent distributors. Correlatively, it held that the existence of a conspiracy restraining the trade of independent *exhibitors* was the only question "distinctly put in issue and directly determined" by the *Paramount* case.

For reasons hereafter stated, the lower court's reasoning was erroneous in law and mistaken in fact. As will likewise be shown, endorsement of the decision below would effectively frustrate the function of Section 5 of the Clayton Act.

2. The Court below erroneously held that Section 5 foreclosed the consideration of "inferences, whether reasonable ones or not"

This Court's decision in the *Emich* case, *supra*, and the lower Court's own analysis of the *Paramount* decree, both repel the idea that Section 5 prohibits the consideration of "inferences, whether reasonable ones or not, that might be drawn from the language of the prior judgment" (R. 696). Such a prohibition is inherently incompatible with this Court's recognition in

Emich that a general jury verdict accomplishes an estoppel under Section 5. As this Court there pointed out, the subsequent Court's determination of the meaning of such a verdict for estoppel purposes must necessarily reflect reasonable inferences derived from the record (340 U.S. at 569):

> "The difficult problem, of course, is to determine what matters were adjudicated in the antecedent suit. A general verdict of the jury or judgment of the court without special findings does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction, *United States* v. *Socony-Vacuum Oil Co.* 1940, 310 U.S. 150, such a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts. *Sealfon* v. *United States, supra;* cf. *State of Oklahoma* v. *State of Texas,* 1921, 256 U.S. 70."

Nor is the difference between the approach used in the decision below and that followed in *Emich* merely theoretical. Rather its practical significance is evident from the paradoxically different results reached by the lower court here and this Court in *Emich*. Under the lower court's rigid formula, the *Paramount* decree was held entirely irrelevant to the allegation that respondents had conspired to suppress competition between them in obtaining pictures for the New York subsequent run market, despite determinations of the

Paramount court that respondents had achieved precisely that result in that very market, pursuant to a nation-wide conspiracy condemned by the Sherman Act. Conversely, in *Emich* the prior general verdict was held to constitute *prima facie* evidence not only of the defendant's conspiracy to monopolize the financing of General Motors automobiles, but "also of its effectuation by coercing General Motors dealers to use GMAC" (340 U.S. at 571). The paradox is accentuated, and the error below is dramatized, by the fact, unique to this case, that the *Paramount* determinations contained express findings of the "particular conspiracy", comprising "the nub of plaintiff's claim" (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 543 (1954)).

Actually, the opinion of the majority below itself exposes the futility and fallacy of the strait-jacketed mental process which the Court was assertedly constrained to apply in construing the *Paramount* determination. Thus, the prevailing judges themselves resorted to inference in fashioning their explanation of the meaning of the *Paramount* findings addressed to the New York neighborhood first run market. This is self-evident from their own choice of language in expressing as follows the view that only exhibitors were adversely affected (R. 698):

> "The aim and *apparent* effect, of that conspiracy was the monopolization by the defendants of the first subsequent run exhibition market in metropolitan New York to the detriment of other theatre *exhibitors* in that area."[14]

[14] "Exhibitors" emphasized in original.

There was no finding of the "effect of that conspiracy" in *Paramount* that was so limited. The limitation to "exhibitors" was inferred by the majority below as, indeed, the compulsive use of the adjective "apparent" betrays.

Furthermore, the lower Court not only resorted to an inference, but went so far as to infer that the *Paramount* findings did not mean what they said. This is plain from the very first sentence of the text of the finding in question. It reads as follows (R. 694, n. 4):

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition *between* them in obtaining pictures."

The plain meaning of this language, notably the use of the word "between", is that by means of the conspiracy respondents avoided the hazards of competing *with each other* in the procurement of film product. What the lower Court did was to evade this straight-forward declaration by inferring that the *Paramount* Court inadvertently used the word "between" when it really meant to say that the effect of respondents' conspiracy was the suppression of "competition [by other exhibitors against] them in obtaining pictures."

Again, as Chief Judge Clark noted (R. 706), the majority tagged on the words "of the major defendants" at the end of the unqualified finding in *Paramount* that by dividing the product of the eight defendant distributors, respondents had suppressed "competition between them in obtaining pictures". This was not a reasonable inference from the actual *Paramount* finding because, as we show below, an un-

warranted change in its meaning resulted. See pp. 23-25, *infra*.

The simple truth is that there are not and can not be any interpretive formulas for construing the effect of a prior adjudication under Section 5 which exclude such a well-established process of legal reasoning as the drawing of a reasonable inference. As has been observed concerning the question of distinguishing between direct and circumstantial evidence, the distinction between direct and indirect apprehension is too often rhetorical rather than scientific and to require its discernment is to insist on a rule "too fine for practical application (*McCoy* v. *United States*, 169 F. 2d 776, 874-5 (9th Cir. 1948); *cert. denied* 335 U.S. 898 (1949). There is and can be only one workable rule for ascertaining the scope of the estoppel of a former decree for purposes of the *prima facie* evidence rule of Section 5. That is to give it the meaning indicated by a fair and sensible reading of the relevant materials. There are no inexorable formulas on the subject. Compare *United States* v. *Austin-Bagley*, 31 F. 2d 229, 234 (2d Cir. 1929), *cert. denied* 279 U.S. 863 (1929).

3. The lower Court's construction of the Paramount decree was mistaken in fact

Contrary to the majority view below, the *Paramount* findings establish that because of respondents' conspiracy in, and monopoly of, the New York neighborhood theatres, independent distributors were denied opportunity to license their pictures "on a competitive basis" in that market. This is a demonstrable fact even when the New York findings in *Paramount* are considered in isolation from the remaining findings concerning the operation of the nation-wide conspiracy.

It is inescapable when the New York findings are placed in the context of the overall *Paramount* determinations.

Concerning the first neighborhood run market in New York, the following facts are undisputed, having been acknowledged by the opinions of the lower courts: Respondents owned the two dominant circuits, comprising 100 theatres, and their treatment of a film determined its fate not only in their own neighborhood houses, playing films first, but throughout the succeeding runs (R. 690-691). Their playing practices, in operating these theatres, were such that, in combination, they could play only 208 pictures annually on the preferable "long-half" of the week and only 104 on the favorable percentage terms accorded the "top billing" on the "long-half" (R. 691, 561-2). During the four year period involved in this case, the eight major distributors, i.e., the *Paramount* defendants, collectively marketed "more than 250 features per year" (R. 565). During the same period Eagle Lion distributed 195 pictures and was actively engaged in attempting to market its pictures in the market in question, controlled by respondents' dominant theatre circuits (R. 691-2).

It is also indisputable, as found in *Paramount*, that respondents engaged in the following collusive and unlawful arrangement in procuring films for their dominant circuits:

> "In New York City Loew and RKO divided the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures. On one occasion where Paramount was having a long dispute with

> Loew's as to rental terms for Paramount films to be shown in Loew's New York neighborhood circuit of theatres, no attempt was made by Paramount to lease its films to RKO for exhibition in the latter's circuit, nor was any effort made by RKO to procure Paramount films as they both evidently preferred to adhere to the existing arrangement, under which Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox, Warner and half of Universal."[15]

The majority below misinterpreted the language, and misconceived the significance of this finding in holding it meaningless so far as the competitive opportunities of independent distributors were concerned. First, the majority arbitrarily elected to focus exclusively upon an effect of the collusive division of film product upon independent exhibitors, while ignoring the *Paramount* court's express and unqualified statement of the effect upon independent distributors—namely, that respondents thereby eliminated "competition between them in obtaining pictures". Nor was this consequence confined in impact to the films of the major distributors, as was inferred by the lower court, but nowhere stated by the *Paramount* court. What the majority below overlooked was the fundamental circumstance that all eight major distributors, not merely the two respondents, had acquiesced in the collusive division of product. This is evident from the finding that even when engaged in a dispute with respondent Loew's, its "assigned" exhibitor, Paramount made no effort to place its films with respond-

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[15] The continuance of this practice during the period 1946-50 was shown by Ex. 22, R. 648.

ent RKO, nor did the latter attempt to procure those films.

The significance of this "eight way" operation of the conspiracy is that each respondent was thereby guaranteed a substantial non-competitive supply of product for its circuit and, indeed, a heavy surplus so far as the preferred percentage playing time was concerned. As noted above, the eight majors, including respondents, annually distributed more than 250 features per year. By virtue of the equal split of their product in the New York first neighborhood market, each respondent was thereby insured of approximately 125 features. This compared with the annual capacity of each circuit to play only 52 pictures per year on the "long-half top-billing", for which the distributor received the more favorable percentage terms, and only 52 more for the second billing on the long-half, which was likewise preferable to short-half billing (R. 561-2).

Hence, the effect of the collusive split was to eliminate any need for respondents to compete with each other, in bargaining for the product of any distributors. From the standpoint of the independent distributor, this meant in turn that his opportunity to compete for the preferred long-half billing or any other playing time in the circuits was at best sharply curtailed. He was faced with a cartelized market in which respondents were economically equipped to deal with him on a take-it or leave-it basis.

In short, the illegal arrangement described in the *Paramount* New York finding had the precise effect of foreclosing Eagle Lion[16] "from access to all but the

[16] 154(d), quoted in full at p. 7, *supra*.

marginal exhibition needs of the defendants" that the Court below said it lacked (R. 698). This conclusion becomes inescapable by the simple process of relating this finding as to the split of product in New York City to the conceded facts concerning the total annual feature film distribution of the eight distributor-conspirators and respondents' playing practice in operating their New York circuits.

Beyond this, the lower court was unrealistic in protesting that there was no finding in *Paramount* that the respondents had agreed with each other "to give preference to the motion pictures of those major distributors that were assigned to them" in those words. (R. 698) The finding of the collusive arrangement of itself comprehended an understanding to that effect among all of the conspirators. Any other view presupposes the fanciful premise that each of respondents' six fellow travelers in the national conspiracy voluntarily agreed to surrender access to one-half of the financially vital New York market, and to forego the opportunity to bargain competitively for outlets in that market, without any reciprocal understanding that its product would be exhibited by the respondent to which it was "assigned". The whole approach below taxes credulity by assuming that six of the national conspirator-distributors were compliant victims of the New York phase of their own conspiracy, while independent distributors enjoyed full competitive access to the market.

When the New York findings are viewed in the full context of the *Paramount* determinations, the decision below is comprehensible only as a manifestation of the "developing trend. . . . of hostility" towards antitrust cases which troubled Chief Judge Clark. Thus, *Paramount* expressly stated and reiterated that the defend-

ants' conspiracy "unreasonably restrained trade and commerce in the *distribution* and exhibition of motion pictures" (R. 641-643). Furthermore, as we shall next show, the overall findings of fact, addressed to the origin, methods, power and scope of the national conspiracy, referred not only to the involvement of the "distribution" aspect of the business, but specifically to the impact on "independent distributors". Those findings, moreover, conclusively determined that the New York arrangement was in the classic pattern of the national conspiracy.

Concerning the origin and methods of the conspiracy, the *Paramount* findings established the following facts: The vertical integration of the major defendants furnished both an "incentive" and "means" for carrying out restraints of competition in both distribution and exhibition (F. 147 (a) and (b); R. 629). The integrated defendants collectively owned 70 percent of the first run theatres in the nation's ninety-two largest cities (F. 147(e); R. 629). They likewise owned 60 percent of such theatres in towns with populations between 25,000 and 100,000 (F. 148(a); R. 630). But "except for a very limited number of theatres in the very largest cities", none could keep its own houses operating solely with its own product (F. 151; R. 632). The "interdependency of defendants to obtain pictures for their theatres . . . and . . . *theatre outlets for their pictures* . . . lessened competiton between them and *independents*" (F. 147(e); R. 629), and resulted in a system in which "[n]o adequate competition among the defendants or between defendants and *independents* can exist" (F. 156(b); R. 639). The geographical distribution of their theatres "became a part of a system in which competition was largely absent"

and which defendants "intentionally maintained" by a variety of means, including "cross-licensing which made it necessary that they should work together" (F. 155; R. 638). Defendants set concerted terms to which "[b]oth *independent distributors* and exhibitors, when attempting to bargain with the defendants . . . have been obliged to conform" (F. 84; R. 612-613).

The power and scope of the conspiracy, including its impact on the distribution business, were described in these terms by the overall findings in *Paramount*: "[M]onopoly power existed among the *eight* distributor-defendants *who were all working together*" and "must be viewed collectively rather than independently as to the power they exercised over the market" (F. 147(d); R. 629). This power could be exerted to "exclude competition from the *distribution* and exhibition markets when desired" (F. 148(e); R. 631). It "might be exercised either against non-affiliated exhibitors or *distributors*" (F. 148(f); R. 631). Defendants had the "intent to exercise the monopoly power" (F. 148(g); R. 631).

The "defendants aided each other in attaining a monopoly of exhibition and restraining competition by refraining from having theatre interests in many areas where one of them had theatres" (F. 152; R. 632). Specifically, in the overwhelming majority of towns of less than 100,000, theatre ownership was confined to only one of the integrated conspirators (F. 153(f); R. 634). Nor did any of them attempt to blanket the 87 largest cities (F. 154(g); R. 638).

The fixed pattern of distribution in New York City was no different in essence than that found in all areas where two or more of the defendants operated theatres.

"In the relatively few areas where more than one had theatres competition was generally absent because the defendants *customarily adhered to a set method in the distribution and playing of their films*" (F. 156; R. 638-639). "[T]he privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool *or an arbitrary division of the product* known as a 'split'" (F. 156(a); R. 639).

Precisely such a "split" was employed in the New York first neighborhood run. Specifically, in that market, the only one specifically held to have been monopolized,[17] the *Paramount* court found that the respondents arbitrarily divided the product of their coconspirators so that "Loew's circuit consistently exhibited the films of itself, Paramount, United Artists, Columbia and half of Universal, while RKO exhibited the films of itself, Fox Warner and half of Universal" (F. 154(d); R. 636-37). It expressly found that for this reason "there is no competition between Loew and RKO in obtaining pictures" (F. 154(g); R. 638).

The *Paramount* case thus established that the conspirators' manipulation of the first neighborhood run market in New York followed the classic pattern of the national conspiracy. Loew's and RKO's domination in this instance was aided by their fellow conspirators' total forbearance from operating New York neighborhood theatres. The other distributor conspirators thereby remained dependent upon RKO and Loew "to obtain theatre outlets for their pictures" in that market (F. 147(c); R. 629). In turn, RKO and

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[17] C. 16, quoted in full at pages 7-8, *supra*.

Loew's remained dependent upon their co-conspirators "to obtain pictures for their theatres" in that market, as well as theatre outlets for their pictures in other markets. (*Ibid*)[18]

In summary, an analysis of the *Paramount* judgment and findings in accordance with *Emich*, shows the judgment to be proof of a conspiracy aimed at Eagle Lion in the precise market involved in this case. And, as we shall show in the succeeding section of this argument, the result of the erroneous analysis of the *Paramount* judgment made below was an equally erroneous analysis of Eagle Lion's damage proof.

II. THE FAILURE TO ACCORD THE FULL BENEFITS OF THE PARAMOUNT DECREE CAUSED ERRONEOUS REJECTION OF EAGLE LION'S PROOF OF DAMAGES

The District Court's ultimate finding on the question of damages was as follows:

> "The Court finds as a fact . . . that plaintiffs have failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis." (R. 581)

We shall show that this finding was an inevitable result of the District Court's failure to find the existence of the conspiracy and cannot stand if the District Court was wrong on the issue of conspiracy.

To measure its damages, Eagle Lion undertook strictly to comply with the rule laid down by this Court

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[18] There were, of course, numerous areas where these respondents had no theatres. See F. 153-153(g), inclusive; R. 632-634; F. 154-154(b), inclusive, R. 634-636.

in *Bigelow, et al.* v. *RKO Radio Pictures*, 327 U.S. 251 by comparing the performance of its product in the monopolized market with the performance in that same market of the product of the conspirators. The income from Eagle Lions films exhibited in the neighborhood theatres, in New York City was first compared with the income from the same films nationally, and a ratio of 6.4% established. The same comparison for the eight major distributors established a ratio of 8.9%. These ratios showed the eight distributors doing substantially better in the monopolized area, in proportion to their national performance, than Eagle Lion. Eagle Lion contended that the difference between its ratio (6.4%) and the other distributors' ratio (8.9%) reflected the amount by which Eagle Lion's income in New York was reduced by operation of the conspiracy. Neither Court below challenged the accuracy of the resulting loss of earnings—$419,000.[19]

The District Court, however, refused to accept this evidence of damages, on the ground that the lower ratio in New York might conceivably have been due to many factors other than illegal conduct by the respondents.

> "The fact that they did not earn as much in New York as they did proportionately in the rest of the country is not persuasive proof that there was discrimination against them . . .
>
> * * *
>
> "The fact that there are more Cadillacs per capita New York, or more mink coats per capita

[19] This was computed by applying to the calculated loss in gross income ($919,000.00), the percentage which experience had shown Eagle Lion would normally retain. R. 256, 248, 340.

> in New York, than in the Country as a whole does not establish that there is a conspiracy in New York against cheaper cars or cheaper furs." (R. 575-76)

This resort to speculation about automobiles and furs is understandable only in light of the prior failure to observe that the *Paramount* decree was evidence of a conspiracy in New York against independent distributors of motion pictures. Absent what was established by that decree, these ratios might be thought to prove little more than that Eagle Lion made a relatively poor showing in New York neighborhood theatres. But the proof was offered only to show the impact of the respondents' illegal conduct upon Eagle Lion's business in the monopolized market.

This Court readily accepted such comparative data in *Bigelow*, *supra*, not only as proof of the amount of injury but also as proof of the cause of the injury (327 U.S. at 265):

> "... the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."

Had the District Court given proper effect to the *Paramount* decree as required by Section 5 of the Clayton Act, these statistics would have appeared in a wholly different light. As evidenced by the *Paramount* decree, the RKO-Loew's monopolization of exhibition in the New York neighborhood theatres and conspiracy to divide the product of the major distributors had the effect of narrowing the market for independent

distributors in two critical respects: (i) theatre availabilities; (ii) playing time in the theatres.

Theatre Availabilities. The RKO and Loew circuits between them comprised 100 of the most strategically located theatres in the metropolitan area. Under the buying policy pursued by both circuits during the years 1946-1950, blanket deals were normally made for the entire circuit. As a result, in attempting to sell pictures in the New York neighborhood run market, Eagle Lion found the 100 potential buyers represented by the theatres comprising the circuits, were narrowed down to the two actual buyers—RKO and Loew's.

Furthermore, because of the mechanical play-off system in effect in the New York neighborhood run market, access to the circuits affected access to the approximately 500 independent subsequent run houses in the area. Failure to obtain play time on the circuits meant more difficult access to the approximately 500 independent theatres which followed RKO and Loew's. Consequently, the circuit exhibition monopoly effectively narrowed, for Eagle Lion, a market of 600 potential buyers down to two critical buyers—RKO and Loew.

Available Playing Time. In dealing with the two key buyers in the area, the RKO and Loew circuits, Eagle Lion found that the split of the majors' product between the two circuits preempted most of the choice playing time available on the two circuits. As already noted,[20] these circuits' playing policy permitted the consumption by both circuits of only 104 features per

[20] See pages 5, 22, *supra*.

year on the preferred percentage rental terms. But during the damage period involved, the major distributors produced an annual average of approximately 250 features per year. Even if both playing positions on the long half of the week on both circuits be counted, only 208 positions were available, far short of the number needed by the circuits to accommodate the major distributors assigned to them, not to mention the independent distributors beyond the pale.

In view of the Paramount decree and this proof of the limited opportunities for exhibition of independently distributed pictures in the monopolized market, the 6.4-8.9 ratios were more than a mere statement that Eagle Lion did not do as well in New York as the conspirators competing with Eagle Lion in selling films. They constituted a showing that Eagle Lion did not do as well in an area where these competitors had *so narrowed and rigged the market for independent film product that comparatively poor earnings for Eagle Lion films were to be expected.* In this setting, Eagle Lion had made a *prima facie* showing of damages by proving that the Eagle Lion earnings in the rigged market were in fact proportionately lower than the conspirators' earnings.

It is true that Eagle Lion's proof as to the amount of the damages was still subject to uncertainties and was open to rebuttal. But if the respondents' conspiracy had been taken as established, Eagle Lion was entitled, as Judge Clark said below, to "the well established principle casting upon the the wrongdoers the risk of uncertainty as to the damages that flow from a wrong." (R. 708). *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251. This Court's summary of its approach to damage questions where a conspiracy is proved is precisely applicable here:

> "In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." (327 U.S. 251, 264)

Eagle Lion did not rely exclusively, however, upon a logical inference from the nature of the proven conspiracy for proof of injury. It offered undisputed evidence that Eagle Lion's distribution business suffered because independent producers, upon whom Eagle Lion relied to obtain an adequate supply of pictures, knew how the New York market was rigged and refused to do business with Eagle Lion because of it. The independent producers, in their negotiations with Eagle Lion, expressed an awareness of the fact that Eagle Lion could not gain the kind of access to the affiliated theatre circuits in general, and the monopolized market in New York in particular, that the distributor parties to the conspiracy could gain for them.

Some of these producers, such as Rathvon, formerly President of RKO, Seidelman, formerly a Universal executive and Arthur Krim, who had served as counsel for distributors before becoming President of Eagle Lion Studios, knew of the conspiracy because of their own intimate contact with the conspirators.[21] Others, such as Walter Wanger, who was releasing pictures both through Eagle Lion and through Universal at about the same time were able to observe the impact of

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[21] See Ex. 30, R. 650-51, where Krim said: ". . . I naturally knew of the New York problem through my activities as counsel for distributors,—but I never realized the true impact until this opportunity to see it work at first hand."

the conspiracy at first hand by comparing their returns from Eagle Lion distribution with distribution by a party to the conspiracy.

But all producers with whom Eagle Lion dealt or tried to deal, knew enough about the industry to be aware of this handicap and this knowledge frequently deprived Eagle Lion of good pictures. For example, Eagle Lion's negotiator testified that, in 1950 a producer named Spiegel "agreed to give Eagle Lion a distribution agreement on 'When I Grow Up,' but refused to give one with 'African Queen,' which was the one we were really interested in, stating that he couldn't entrust that important a picture to Eagle Lion because of, not only its weakness with the circuits, but even if they got into the circuits, he felt they wouldn't get the maximum terms which the picture would be entitled to and wouldn't play off fast enough for him." (R. 332) "African Queen" went to United Artists and grossed four million dollars, on which the normal distribution fee would be at least 25% (R. 106-7). "When I Grow Up" had a small gross and "resulted in a substantial loss." (R. 332).

Similarly, Joseph Seidelman, a former Universal executive, and Howard Welch negotiated with Eagle Lion for a group of "rather expensive pictures", but after a week of negotiations Seidelman "finally told us that he had concluded that the Eagle Lion distribution strength was not sufficient, that we were too weak with the circuits, and these pictures required very important circuit treatment, and I know the first two of those pictures ended up at Warner Bros. . . ." (R. 333).

Edward Small, who had made two pictures for Eagle Lion distribution, when sounded out about making more pictures for Eagle Lion said "he felt that he could do better with United Artists or one of the other

companies because he did not think we were extracting the maximum revenue from the circuits." (R. 334)

Walter Wanger, who had also made two pictures for Eagle Lion, "came in periodically when he got reports from the New York accounting office of Eagle Lion and complained about the fact that in his opinion the pictures were not getting the revenue which their quality entitled them to and complained in particular that the liquidation of the pictures was unduly slow and he had a number of pictures then in release by Universal and he compared the reports on the various pictures to show how poorly Eagle Lion was doing and, in particular, in the large cities where the circuits were important, and told me on the basis of that record he was not interested in doing further business." (R. 334-35)

In his negotiations with Eagle Lion, the independent producer, Alperson summed up the situation as follows: "The eight major companies had established precedents for prices and times of playoff with the circuits that neither Eagle Lion or any other independent had, and therefore the pictures of Eagle Lion, unless the picture had unusual strength so it could stand on its own feet, did not get as good a treatment because of the lack of precedent that the pictures of the eight majors got. * * * if it didn't have unusual merit of its own so that the circuits would make an exception, it did not get the kind of treatment that comparable pictures of the majors would get." (R. 338)

As the Court below noted, Eagle Lion had enough pictures to operate at a profit only during the last six months of 1950, when it obtained a substantial number of additional pictures through merger negotiations with another independent, Film Classics. (R. 563)

The additional pictures made no change in the ratio of the revenue Eagle Lion was taking out of the New York theatres to its national gross, and Eagle Lion's president was afraid that Eagle Lion would not get the access to the New York circuits that he "considered to be critical to our successful operation." (R. 109). The extra gross from the Film Classics' pictures which had produced the profits earned during the last half of 1950, began to die out in the first three months of 1951, and Eagle Lion's distribution business was sold to United Artists on May 28, 1951. (R. 110-111). The loss sustained on the sale was $146,440, as the District Court noted. (R. 563). Both courts below failed to note the connection between this sale and the respondents' conspiracy because they found no conspiracy.

If, as the Court in the *Paramount* case held, independent distributors were a target of the conspiracy found in that case, the foregoing proof established beyond a doubt that the respondents' participation in that conspiracy had substantially injured Eagle Lion. Regardless of whether the extent of Eagle Lion's injury should be measured by the loss sustained on the sale of the distribution business to one of the conspirators or by the loss of income from the New York market previously discussed[22] or by a combination of both losses, there is no question as to the fact of injury from illegal conduct. No finding of the District Court purports to rebut the facts noted above which show that the conspiracy was a substantial cause of Eagle Lion's inability to obtain for distribution pictures of the quality handled by the conspiring distributors. The District Court's finding that there was no illegal injury had, as its sole basis, a stubborn refusal to recognize that a conspiracy which could injure Eagle Lion had ever existed.

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[22] See page 30, *supra*.

CONCLUSION

In short, the District Court's failure to give proper effect to the *Paramount* decree as required by Section 5 of the Clayton Act not only prevented it from reaching a correct conclusion as to the conspiracy; it led that Court into the erroneous conclusion that Eagle Lion had failed to prove damages. No matter how the District Court's opinion is analyzed, its erroneous conclusion on conspiracy cannot be separated from its findings on damages. The Court of Appeals thought the statistics were "susceptible of conflicting interpretations" only when viewed as "proof of the existence of the alleged conspiracy." (R. 703).

We respectfully submit that Eagle Lion's proof was susceptible of only one interpretation, i.e. substantial injury from the conspiracy, once the existence of the conspiracy is recognized. Since Eagle Lion's proof of illegal injury was unrebutted, the case should be reversed and remanded to the District Court for a determination as to the extent of that injury.

Respectfully submitted,

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